Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

RICKY HAGENBUCH; CATHY HAGENBUCH;
RICKY HAGENBUCH BUILDING CONTRACTOR,
INCORPORATED; HEALTHFUL LIVING,

Petitioners,

v.

COMPAQ COMPUTER CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners exclusively used a 1-800 telephone number for five years to market products to customers across the nation. After several telephone related companies ("respondents") inadvertently began using petitioners' 1-800 number petitioners filed a lawsuit claiming that they had a property interest in their 1-800 number. The district court dismissed petitioners' claims on the pleadings relying on a recent Virginia Supreme Court ruling that internet domain names like telephone numbers were wedded to the services on which they rely and were not property. The following questions are presented in this petition:

1. Whether a business has a constitutionally protected property interest in a 1-800 telephone number or in an Internet address where the business has "constructive possession" of it and invests in it or whether a telephone company may unilaterally and arbitrarily reassign it to another business.

2. Whether the following statutes or regulations confer upon a business owner a property interest in its 1-800 number or domain address: (1) Federal and state public utility tariffs; 2) The Telegraphs, Telephones and Radiotelegram Act; (3) The Bankruptcy Act; and (4) The Trademark Act.

3. Whether state or federal tariffs that are written by telephone companies and deny telephone subscribers any property interest in their 1-800 telephone numbers constitute a "taking" without due process in violation the Fifth and Fourteenth Amendments.

4. Whether a given telephone company that does not provide telephone service to an individual owes that person a duty to protect his right to or usage of his telephone number under The Telegraphs, Telephones and Radiotelegrams Act or under tariffs.

LIST OF PARTIES

Petitioners hereby identify the following parties to this action pursuant to Rule 14.1(b):

1. Compaq Computer Corporation which is a respondent to this petition;

2. SBC Communications Inc. which is a respondent to this petition;

3. Pacific Bell Telephone Company which is a respondent to this petition;

4. Pacific Bell Internet Services which is a respondent to this petition;

5. Southwestern Bell Internet Services, Inc. which is a respondent to this petition;

6. Ameritech, Inc. which was a defendant in the lower court action but which is not a party to this petition;

7. DSL Technologies, Inc. which was a defendant in the lower court proceeding but is not a respondent to this petition;

8. ASI Computer Technologies, Inc. which was a defendant in the lower court proceeding but is not a respondent to this petition.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 Ricky Hagenbuch Building Contractors, Inc. who is a petitioner in this matter hereby discloses that it is a privately held corporation, with no parent corporations or shareholders owning 10% or more of the corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The district court (per Ellis, T.S., III) granted respondents' respective motions to dismiss (Appendix ("Pet. App.") 3a-13a). The court of appeals (per curium Widener, Luttig, and King) affirmed (Pet. App. 1a-2a). The court of appeals' denied petitioners' motion for panel rehearing (*Id.* 17a-18a). All opinions are unreported.

STATEMENT OF JURISDICTION

Jurisdiction in the district court was based on diversity of citizenship and amount in controversy pursuant to 28 U.S.C.A. § 1332(a). The court of appeals entered its order affirming the opinion of the district court on October 16, 2001 and denied rehearing on November 30, 2001. Justice Rehnquist subsequently extended the time to file this petition up to and including March 30, 2002. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provision of the Telegraphs, Telephones and Radiotelegrams Act, 47 U.S.C. §§ 1 *et seq.* relevant to this petition are reprinted in the appendix (*id.* 19a-20a).

STATEMENT OF THE CASE

Petitioner Healthful Living sells health care products and services through its 1-800 telephone number that it markets to a national clientele. Respondents formed a joint venture combining computer and internet services. As part of their promotion they mistakenly began referring their customers to petitioners' 1-800 number instead of to their own 1-800 customer service line. Petitioners filed suit alleging a violation of the Act

and several state tort claims including negligence and injury to property. The district court dismissed petitioners' claims on the pleadings ruling that a telephone number was not property under Virginia law and that respondents owed no duty to petitioners.[1] (Pet. App. 9a, 12a). Petitioners only appealed the dismissal of their negligence and injury to property causes.

The district court relied on a recent Virginia Supreme Court case that held that domain names like telephone numbers do not exist "separate from the respective service that created it and that maintained its continued viability." *Id.*, *citing Network Solutions, Inc. v. Umbro Int'l, Inc.*, 529 S.E.2d 80 (Va. 2000). The district court further ruled that since there was no injury to property involved the claim for relief was one for economic loss that required privity of contract. Privity was lacking because petitioners do not maintain their 1-800 service with respondents. In dismissing the negligence claim, the district court ruled that there was no duty alleged and that the Telegraphs, Telephones and Radiotelegrams Act, 47 U.S.C. §§ 1 *et seq.* ("Act") did not confer a duty upon respondents to protect petitioners' use of their 1-800 number. The Fourth Circuit affirmed finding no error in the ruling and reasoning of the district court. (Pet. App. 2a).

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1. The district court dismissed on two alternative grounds: (1) For failure to state a claim upon which relief could be granted; or (2) Alternatively, for failure to establish subject matter jurisdiction. (Pet. App. 7a-8a). However, the later basis was mooted by petitioners' motion for leave to amend their complaint to more clearly set forth the grounds for subject matter jurisdiction. It was filed at the same time that the order dismissing petitioners' claims was filed. The court denied petitioners' motion for leave ruling, "Because plaintiffs' Second Amended Complaint raises three state law claims that are identical to Counts II, III, and IV of the Amended Complaint, which were dismissed by Order of even date, leave to amend must be denied as Amendment of the complaint is futile." (Pet. App. 14a-16a). Therefore, the district court dismissed because the claims still failed as a matter of law and not because subject matter jurisdiction was still lacking. That was cured by the denial of the proposed Second Amended Complaint. Therefore, the dismissal of petitioners' case was only based on the merits.

1. Petitioners include Ricky Hagenbuch and Kathy Hagenbuch who are Virginia residents and the sole owners of Healthful Living and Ricky Hagenbuch Building Contractor, Inc. (collectively "petitioners"). Healthful Living's predominant means of communicating with its clientele and selling goods is through its 1-800 toll free telephone line (the "1-800 number"). The 1-800 number rings into the home of the Hagenbuchs where both companies conduct business. Petitioners have exclusively and continuously used the 1-800 number since 1995 when they entered into a subscription agreement with their long distance service provider. Appellants invested in marketing the number because they believed that unlike regular telephone numbers it was not subject to change.

Thousands of businesses like Healthful Living throughout the country have come to rely on 1-800 numbers as a convenient way for their customers to contact them and order products. Businesses pour thousands and sometimes millions of dollars into advertising campaigns aimed at informing the public of their 1-800 number. Whether a listener or viewer is in front of their steering wheel, a newspaper or their television set they are regularly exposed to 1-800 numbers. Consequently, they have become valuable marketing tools and commercial assets.

This interest and excitement has recently expanded to internet domain names. Both telephone numbers and internet domain names ("commercial addresses") in essence provide a company's "commercial address" to the public where they can access their commercial enterprise without leaving their house or office.[2] They often include a catch phrase or a tradename that

2. By using the phrase "commercial addresses" to characterize telephone numbers and domain name addresses petitioners in no way compare them with street addresses. The two are markedly different in terms of property interests. A street address usually refers to roadways which, of course, are public property and can be renamed by the government for the public benefit. Conversely, telephone lines and transmissions, while they exist for the public use, are private property. (Cont'd)

is easily communicated to and easily remembered by the prospective customer. Both dramatically increase public access to enormous amounts of information about products and almost every imaginable aspect of life and society. They have become vital to our economy and the manner in which companies transact business.

2. Respondents include Compaq Computer Corporation ("Compaq"), the manufacturer and seller of personal computers, as well as a group of telephone and internet companies that are related to SBC Communications, Inc. ("telephone companies").[3] The telephone companies connect their millions of subscribers of telephone service to telephone numbers and internet sites nationally and worldwide.

Sometime in 1999 Compaq and the telephone companies entered into a cooperative arrangement to provide customers who signed up for DSL internet service with a computer at a reduced price. They also provided their customers with a 1-800 telephone number that they could call for 24-hour technical support and customer service. However, in printing the number on their informational material they inadvertently inverted the last two numbers. The number they provided to their customers was petitioners' 1-800 number.

For an extended period of time petitioners received hundreds of calls at their home and place of business from respondents' customers seeking technical help. Petitioners were

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(Cont'd)
However, simply because the telephone companies own and maintain the lines does not mean they own all interests in telephone numbers. This is one reason they are regulated.

3. The telephone related companies include SBC Communications, Inc. that is a holding company for various operating subsidiaries including respondents Pacific Bell Telephone Company which is a telephone company and SBC Advanced Solutions, Inc., Southwestern Bell Internet Services, Inc. and Pacific Bell Internet Services which are internet related service providers.

billed for these calls. After contacting the respondents and complaining about the problem petitioners continued to receive calls at their home at all hours of the day and night. This made it impossible for them to use their 1-800 number and transact business.

In our modern economy businesses cultivate commercial addresses just as they would a trademark. Based on their use of and investment in these numbers they treat them as their intangible and/or intellectual property. In fact businesses currently find themselves in the predicament of having to purchase similar or identical telephone numbers and domain names in order to protect and strengthen their trademark. Given the value of these commercial addresses and marks creditors have attempted to garnish them. Receivers in bankruptcy proceedings have sought with success to shield them as assets of a business in order to facilitate a sale or to protect the estate. Telephone companies have eagerly sought to maintain control over them. And, customers and investors have relied on their continued existence, viability and usage.

We are also in an information age where new mediums of communication have appeared for businesses and their customers. They include cell phones, 1-800 numbers, cable, satellite transmissions and the internet. Businesses have come to rely on and revere these new information channels to increase sales, create efficiencies and reduce costs. These advancements have been directly handed down to the public in enumerable ways from allowing comparison shopping with the flick of "mouse" to accessing huge bodies of information without leaving the kitchen. Over time business have naturally formed certain assumptions and expectations about their proprietary interest in the commercial addresses they invest in.

For example, if someone buys an air mattress from a T.V. infomercial it may arrive with a ten-year warrantee and a 1-800 number stitched onto it. The customers assume that they will be ability to contact the manufacturer across the country at that

same number eight years later. If the telephone companies can unilaterally and arbitrarily change the 1-800 number or give it to another business all the assumptions the public and businesses have relied on falls by the waist side.

This is especially true because these assumptions have constitutionally protected underpinnings. However, the caselaw has not yet solidified and uniformly applied those rights to 1-800 numbers and the domain names. The law trails behind the exponential growth within this industry and the novel property, constitutional and statutory issues that have arisen. This reality has allowed conflict among federal and state courts.

3. In order to protect their property rights in their 1-800 number petitioners filed a complaint and a motion for preliminary injunction in the United States District Court for the Eastern District of Virginia. Following a hearing petitioners' motion for preliminary injunction was denied. Compaq and the telephone companies then filed separate motions to dismiss in lieu of filing responsive pleadings. They argued that a recent Virginia Supreme Court case and an FCC ruling supported their position that telephone numbers were not property.

The district court made two rulings that are relevant to this petition. First, it dismissed the injury to property claim ". . . because the Supreme Court of Virginia has held that an individual does not have a property interest in his or her telephone number." (Pet. App. 9a), *citing see Network Solutions, Inc.*, 529 S.E.2d 80 (Va. 2000). This statement comprised the entire analysis on the issue in part because there had been no record. Moreover, *Network Solutions* only analyzed the characteristics of domain names referencing telephone numbers by way of analogy. This was unfortunate because no Virginia court had directly considered whether telephone numbers were property.

By simply relying on *Network Solutions* the Fourth Circuit did not identify the relative interests of the parties in the telephone number. It did not determine whether petitioners had

"constructive possession" of their number, a standard enunciated by this Court. More significantly *Network Solutions* in turn relied solely on two bankruptcy cases handed down in 1961 and 1970 which run contrary to the prevailing application of the Bankruptcy Act.

The analogy made by the Virginia Supreme Court between these two commercial addresses does present this Court with an opportunity to dispose of both of these cutting edge issues. This is perhaps appropriate given the nearly identical features of the two types of addresses. Not only does caselaw exist to adequately brief both issues but respondents include sophisticated telephone and internet companies that have an interest in and knowledge of both mediums.

The second pertinent ruling involved the dismissal of petitioner's negligence claim. One of the claims initially brought by petitioners was an alleged violation of the Telephone, Telegram and Radiotelegraph Act, 47 U.S.C. §§ 1 *et seq.* (the "TTR Act"). While petitioners did not appeal the dismissal of that cause they averred in their complaint that it nonetheless conferred a duty on respondents to protect their use of and right to their 1-800 number. Specifically, the TTR Act provides that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable." (Pet. App. 19a). Petitioners argued that this language supported petitioners' independent negligence claim.

The district court held in pertinent part that because the federal statute is not "applicable to this case . . . plaintiffs have not stated any legal duty owed to plaintiffs that defendants have breached." (Pet. App. 19a-20a). Again, there was no other analysis or authority cited on the issue. The district court ruled by implication only that the Act did not confer a duty upon respondents. Perhaps the Court relied on its observation that Section 201(b) of the TTR Act fails because petitioners provided no telecommunications services to plaintiffs. (Pet. App. 6a). This was true. However, the issue remains whether telephone

carriers that provide local and long distance service to the public owe a duty to businesses to protect their use of 1-800 telephone numbers regardless of whether the carriers provide service to them. Since telephone companies control the facilities and the satellites, if they do not the public rights to telephone numbers, who will?

4. On October 16, 2001 the Fourth Circuit affirmed the ruling of the district court finding no error in the ruling or reasoning of the court. As such there was no substantive evaluation of the basis of the district court's opinion. On October 30, 2001 petitioners filed a motion for a panel rehearing elaborating on petitioners' argument that the TTR Act conferred a duty on respondents. On November 30, 2001 the Fourth Circuit denied petitioners' motion for rehearing.

5. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The petitioner should be granted for several reasons. First, the case is of great public importance in our technological and information age. The Fourth Circuit's judgment threatens to extinguish property interests associated with commercial addresses that thousands of businesses have invested billions of dollars in developing and marketing. This would in turn affect the ability of the public to communicate with businesses and to access enormous amounts of information provided through the internet by governments, institutions and businesses. These investments and advancements have only been possible because businesses and institutions have assumed that their commercial addresses would not be taken from them. The viability, development and use of these new technologies and mediums hang in the balance.

There is no clear and consistent authority on the issue from this court or among the circuit courts. The Fourth Circuit relied on a Virginia Supreme Court case that conflicts with rulings of other states as well as the Fifth and First Circuits that have

held that property interests vest in commercial addresses. The decisions in this case also conflicts with the ruling of this Court because the Fourth Circuit essentially held that a telephone subscriber does not have "constructive possession" of a telephone number which would have conferred a property interest. *See Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 481 (1940). Lastly, the Fourth Circuit decided an important federal question that appears to conflict with the Bankruptcy Code and possibly two other federal statutes. Underlying all of these issues are fundamental property rights protected by the constitution. *See Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955).

I. THE DECISION BELOW DEFEATS FUNDAMENTAL CONSTITUTIONAL RIGHTS AND CONFLICT WITH THIS COURT'S RULING

The telecommunications industry is unusual in that each telephone carrier regardless of the state or region in which they do business sends transmissions to every part of the nation and the world every second of every day. It is an inherently interstate business as Congress acknowledged in passing the Act in 1943. The industry requires regulatory uniformity so the technology is interfaced among various companies and so that a mobile public will always know what to expect when using a phone. Petitioners suggest that constitutional principles and theories of liability must also be uniformly distributed throughout the nation. This is especially true given that at least four federal statutes are applied to resolve disputes concerning commercial addresses. There must be a standard tying these laws together in every state.

Petitioners have identified economic interests in maintaining rights to their 1-800 number. However, the telephone companies also advance the public interest by maintaining significant control over the millions of regular telephone numbers issued. For example, with the wide acceptance of fax machines, cell phones and independent lines

for modems the number of regular numbers have risen dramatically. This has required the introduction by the telephone companies of many new prefixes or area codes requiring wholesale changes in telephone numbers. Also, demand for toll free and pay-per call numbers have increased to include 1-900, 1-888, 1-222, ect. These additions and changes clearly advance the public interest.

The Fourth Circuit as well as the Virginia Supreme Court did not address constitutional implications of the dispute. Perhaps this occurred because the dimensions of property rights have traditionally been defined by state law. *Parratt v. Taylor*, 451 U.S. 527 (1981), *rvrs'd on different grounds, Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Also, as with many disputes concerning telephone numbers, there was no state action or "taking" appropriate for a Fifth or Fourteenth Amendment analysis. Nonetheless, the constitution as well as natural fundamental rights have been held to protect property rights absent a "taking" without just compensation or due process.[4] Therefore, constitutional principles should have been considered in rendering the decision below but were not.

In failing to consider constitutional implications the Fourth Circuit ignored the fundamental traits of 1-800 numbers. They are distinguished from regular numbers in that they usually involve subscription contracts and businesses invest in and rely

4. Property rights are fundamental inalienable rights and are not dependent upon the Constitution of the United States or the federal government for their existence. *Hodge v. United States*, 203 U.S. 1 (1906), *rvrs'd on other grounds, Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Logan v. United States*, 144 U.S. 263 (1892) (distinguishing between rights declared and rights recognized); *Associacion de Trabajadores, Etc. v. Green Giant Co.*, 518 F.2d 130, 164 (1975), *citing* J. Locke, Of Civil Government 82-85 (1924); J. Adams, A Defense of the Constitutions of Government of the United States of America, in F. Coker, Democracy, Liberty, and Property 121-132 (1942). It is protected under the Fourteenth and Fifth Amendments, the protection of which is one of the most important purposes of government. *Culp v. United States*, 131 F.2d 93, 98 (CA 8 1942).

on them believing they will not change unless they fail to pay their bill. Consequently, the inconvenience and risk of injury in changing a 1-800 number is significantly greater than that of regular telephone numbers which may only involve notifying friends and family. 1-800 numbers also often merge with other intellectual property such as customer lists, operating cash and goodwill.

In ruling that commercial addresses merge with the service it relies on to function the district court did not consider the other independent qualities of a commercial address. The term "property" refers not to a right in the corporal thing but rather to a collection of rights and interests in it. *See United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). It is not what the telephone number is – a group of numbers in a sequence – that determines rights thereto but rather what it does and how it is used.[5] It is also irrelevant whether the subscriber holds "undisputed title" to the group of numbers if it has, for example, constructive possession of it. *See Thompson*, *infra*, 309 U.S. at 481 (1940). This Court held in *Thompson* that a bankruptcy court has summary jurisdiction over property of which the debtor has actual or constructive possession. *Id.*

In other words, telephone companies can own title to the number but the use and possession of it may still vest a property right in the subscriber under this Court's ruling in *Thompson*.[6] Petitioners note that other property interests can attach to telephone numbers including a business "expectancy" in the continuation of the number. *See Perry v. Sindermann*, 408 U.S.

5. "[F]or a business . . . telephone numbers constitute a unique property interest, the value of which increases as the number becomes widely known through publication in guidebooks, posting on billboards, and imprinting on publicity items." *In re Security Inv. Properties, Inc.*, 559 F.2d 1321, 1324 (CA5 1977).

6. Use of a thing is a constitutionally protected property right. *Id.* The issue of paramount importance in determining whether an interest exists is usage. *Appeal of Perrin*, 305 Pa. 42, 49, 156 A. 305, 307 (1931); 79 ALR 912; 16A Am Jur 2d, Constitutional Law §§ 580 *et seq.*

593, 596 (1972). Petitioners clearly had use as well as an expectancy because 1-800 numbers unlike regular numbers are not subject to change.

This is the precise issue addressed by this Court in *Lynch v. Household Finance Corp., Conn.*, 405 U.S. 538 (1972), *rehearing denied*, 406 U.S. 911 (1972). In that case holders of bank accounts sought to have a statute declared unconstitutional that allowed prejudgment garnishment of bank accounts by creditors. This Court held: "The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel is in truth a 'personal' right whether the property in question be a welfare check, a home, or a savings account." *Id.* at 552. As with bank accounts a telephone number relies on a service to have any value, it consists of a series of numbers and it is given by a business for its customers' use.

Given the extent to which the public relies on them and the investment made in them commercial addresses would appear to embody more attributes of property than a banking account. And the risk of injury to the business if the right is suddenly withdrawn is infinitely greater. If an analogy can be made between bank accounts and telephone numbers, there are numerous state and federal rulings that directly conflict with the ruling of this Court in *Lynch*. State statutes that infringe on the use of a thing have been struck down as an unconstitutional deprivation of property rights.[7]

Additionally, the issue presented does involve regulations commonly known as "tariffs". In collaboration with state governments and the FCC pursuant to the Communications Act telephone companies file these tariffs governing the furnishing of telephone service. In most cases they deny subscribers a property right in their telephone numbers. As such tariffs constitute a "taking" without due process. The Second Circuit upheld a tariff that read:

7. *See, e.g., Terrace v. Thompson*, 263 U.S. 197 (1923); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Holden v. Hardy*, 169 U.S. 366, 391 (1898).

> The assignment of a number to a subscriber's number will be made at the discretion of the Company. The subscriber has no proprietary right in the number, and the Company may make such reasonable changes in telephone number or central office designation as the requirements of the service may demand.

Slenderella Systems of Berkeley, Inc. v. Pacific Telephone and Telegraph Co., 286 F.2d 488, 491, n.1 (CA2 1961), citing Rule and Regulation 17(D); *see also First Cent. Serv. Corp. v. Mountain Bell Tel.*, 623 P.2d 1023, 1025 (N.M. Ct. App. 1981). We do not know if petitioners' case involved tariffs because discovery did not commence. However, the Fourth Circuit's ruling explicitly and exclusively relied on *Network Solutions* which in turn relied on two cases upholding tariffs. Therefore, the challenge to these tariffs is ripe for Fifth and Fourteenth Amendment analysis.

Considering that tariffs are formulated on the federal and state level this Court should evaluate the nature of the interest at stake to determine if it is within the Fourteenth Amendment protection of liberty and property. *Board of Regents of States Colleges v. Roth*, 92 S. Ct. 2701 (1972). Clearly, states and the FCC are passing on the contractual rights of subscribers on an ex parte basis. However, even without a "taking" petitioners claim that commercial addresses still raise an important constitution issue that affects tort claims as discussed below.[8]

Most states require telephone companies to write regulations governing the public's use of telephones and to submit them to public utility commissions for approval. In some cases they are upheld by federal courts as containing the force of law as long as the telephone company acted reasonably and

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8. "Due process of law" implies a conformity with natural and inherent principles of justice. *Id.* This law has been formed through gradual judicial inclusion. *Davidson v. New Orleans*, 96 U.S. 97, 104 (1877).

not arbitrarily.[9] Upon acceptance by state officials the tariffs are filed with the utility commission which purportedly operates as notice to the public of the terms of the contract. Another question presented is whether this event constitutes sufficient legal notice to the public of their forfeiture of property interests in their telephone number.[10] The situation is contrasted to cases where courts have upheld contracts signed by both parties that limit property rights in the number. Notwithstanding the adequacy of notice, the problem is that courts throughout the country give tariffs different weight.

In contrast to the Second Circuit's ruling upholding a tariff, other state and federal courts view tariffs as contracts that can be discarded if they are "unreasonable" or contrary to public policy. *See, e.g., Pigman v. Ameritech Publishing, Inc.*, 641 N.E.2d 1026, 1032 (Ind. App. 1 Dist. 1994). One of the assumptions made is that telephone companies and subscribers are not in "positions of equal bargaining" when tariffs are filed.

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9. American Telephone and *Telegraph Company v. City of New York*, 83 F.3d 549, 552 (1996); *See, e.g., Shehi v. Southwestern Bell Tel. Co.*, 382 F.2d 627, 630 (CA 10 1967) (weighing the reasonableness of the telephone company's actions in transferring a number ruling that a telephone provision negatives any property claim of a customer but cannot be construed to authorize the telephone company to exercise arbitrary dominion over the number so as to cause harm and injury to another); *Atkin Wright & Miles v. Mountain States Tel. & Tel. Co.*, 709 P.2d 330, 334 (Utah 1985) (ruling that the telephone company did not change the number "arbitrarily" but rather was attempting to rectify a mistake made in publishing the number twice); *Price v. South Central Bell*, 313 S.2d 184, 188 (Ala. 1975); *M.R. Glass, Inc. v. N.Y. Tel. Co.*, 264 N.Y.S. 2d 160, 162 (N.Y. 1965) (ruling that whether tariffs are unreasonable is a matter for the Public Service Commission in the first instance).

10. There may be a distinction on this issue between the various types of telephone numbers. 1-800 subscription agreements usually involve an agreement which gives actual notice. Normal telephone numbers do not. In such cases telephone companies simply rely on tariffs to solve disputes.

Id. In overriding a public tariff the Fifth Circuit succinctly framed petitioners' position;

> A tariff, however, drafted by the company and certain to be self-serving, cannot determine the meaning of the term "property" in the federal bankruptcy statute. The telephone numbers are a valuable asset, just like the hotel's building or furniture. The purpose of summary jurisdiction is to give the bankruptcy court a quick means of preserving the wherewithal for maintaining the debtor's business. Protecting use of the telephone numbers by the debtor clearly falls with that responsibility.

In re Fountainebleau Hotel Corporation, 508 F.2d 1056, 1059 (CA5 1975). Whether regarded as a regulation or a state law, petitioners suggest tariffs are being used by telephone companies to deprive businesses of their property without due process. (Petitioners were not given notice or a hearing before respondents began using their number.)

Extending property rights to commercial addresses is also consistent with the modern trend toward expanding property rights. Courts liberally construe constitutional provisions in favor of the right of property.[11] This expansion was accelerated by *Board of Regents v. Roth*, 408 U.S. 564, 561 (1972). There, this Court held "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Regents* at 2709. An entitlement arises from present use and benefit and cannot be suddenly and arbitrarily withheld. *See Peer v. Griffeth*, 445 U.S. 970 (1980). It is only when the entitlement is actually conveyed, used and relied upon it transforms into a property right.

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11. *Knoll Associates, Inc. v. F.T.C*, 397 F.2d 530, 535 (CA 8 1968); *U.S. ex rel. Flannery v. Commanding General*, 69 F. Supp. 661, 665 (D. N.Y. 1946).

This trend is not limited to welfare entitlements but recently include tenure of faculty and business licenses. In balancing public versus private interests the question becomes whether there is any significant risk of injury to anyone by extending property rights to commercial addresses. *See Veterans and Reservists for Peace in Vietnam v. Regional Comm'r of Customs, Region II*, 459 F.2d 676, 681 (CA3 1972), *cert. denied*, 409 U.S. 933 (1972). Petitioners suggest there are few while there are tremendous risks to business in denying them the right to use their phone number. Telephone companies simply lose a bit of control.

As it stands there is utter chaos at all judicial levels regarding the relative rights of telephone companies, businesses and the registrars of internet addresses.[12] Precedence must be established to balance the need to encourage and reward technological advancement while preserving fundamental rights and freedoms. This is the unifying issue presented. The law simply has not caught up with the exponential growth and mind boggling capabilities of the technology. If this writ is not granted it could take years before uniform legal standards emerge from the onslaught of cases currently percolating through the courts. This is the unifying issue presented. This can only happen once the property interests already embedded in new technologies are identified and protected.

If this Court does not review this matter the risk to the public as well as to the industry is that each state may treat commercial addresses differently so long as they treat different classes the same under the equal protection clause. *See Holden v. Hardy*, 169 U.S. 366, 386 (1898). The industry requires uniformity. As it stands the judiciary is making isolated conflicting rulings

12. "Whether a particular constitutional protection attaches depends upon the relative weights of the private interest affected and the governmental function involved, and not upon assignment of meaning to the word 'property'." *United States v. Husband R. (Roach)*, 453 F.2d 1054, 1062 (CA5 1971).

on a jurisdiction-by-jurisdiction basis where the industry, the future of the technology and the public calls for uniformity on this issue of national importance.

II. THE RULING OF THE FOURTH CIRCUIT CONFLICTS WITH THE RULINGS OF OTHER CIRCUITS, STATE COURTS AS WELL AS THIS COURT AND IT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW NOT PREVIOUSLY ADDRESSED BY THIS COURT

The dispositive case relied on by the Fourth Circuit is *Network Solutions, Inc.*, *supra*, where a lienholder attempted to garnish a domain name from a judgment debtor. *Network Solutions, Inc.*, 529 S.E.2d at 81 (Va. 2000). The lienholder instituted the garnishment proceeding against the registrar which had conveyed the address to the judgment debtor just as a telephone company transfers a number. It argued that the registrar of that name not only made it an operational internet address by associating it with an "IP number" but that it also granted the holder the "exclusive right to use a unique domain name for a specified period of time." *Id.* at 86.

The case involved first impression and the Virginia Supreme Court claimed to apply "traditional legal principles to [a] new avenue [] of commerce". *Id.* at 81, *citing Intermatic Inc. v. Toeppen*, 947 F. Supp. 1227, 1229 (N.D. Ill. 1996). The Court held, "We are cognizant of the similarities between a telephone number and Internet domain names and consider both to be products of contracts for services." *Id.* at 87. As such it was not intangible property that could be garnished. To support this analogy the Virginia Supreme Court relied exclusively on a case where a default judgment had been entered and sua sponte comments were made drawing from no discovery. *Id.* at 81, *citing see Dorer v. Arel*, 60 F. Supp.2d 558 (E.D. Va. 1999). Moreover, the case relied on involved domain names again only addressing telephone numbers by analogy. *Dorer*, 60 F. Supp. at 561. As such the foundation of the Fourth Circuit's ruling

presented is built on analogy and sua sponte comments which cut off the percolation process. There are not even cards sustaining this house.

Secondly, the Virginia Supreme Court did not distinguish regular telephone numbers from 1-800 numbers used exclusively for business purposes. For this reason it did not even acknowledge the investment made in them that transforms a use into a property right. As such it in no way applies to the case or facts presented in this case. Moreover, its ruling that telephone numbers are bound to the service they rely on is contrary to the rulings of courts. For example, the Fifth Circuit distinguished a telephone number which comprises "unique property interests" from electric service refusing to exercise summary jurisdiction and compel an electric company to continue service. *In re Security Inv. Properties, Inc.*, 559 F.2d 1321, 1324 (CA5 1977).

Lastly, the Virginia Supreme Court cited *American Civil Liberties Union v. Reno* for the proposition that "[w]ithout statutory changes, we are not willing to allow such results in Virginia **simply because [emphasis added]** in today's case we are dealing with 'a unique and wholly new medium of worldwide human communication' known as the internet.' " *Id.* at 87.[13]

Petitioners suggest that *Reno* stood for the proposition that notwithstanding advancements in technology traditional and basic constitutional protections and immunities still can and must be applied by the Courts. The Virginia Supreme Court also cited *Intermatic* for this proposition but failed to apply its principles. Legislative action is not required with every fluctuation in societal norms. Rights and privileges are constants and are simply applied in their immutable form by the judiciary to new avenues of human interaction and to new forms of

13. *American Civil Liberties Union v. Reno*, 521 U.S. 844, 850 (1997) (quoting *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996) (holding that restricting indecent information over the Internet violated the First Amendment).

property and entitlements. Not surprisingly, at least one district court has already rejected the rationale in *Network Solutions* as "unsatisfactory."[14]

The Virginia Supreme Court did, however, correctly note that the two mediums are strikingly similar. *Id.* at 84. The traditional telecommunications network supported by highly advanced communication leaders has been fertile soil from which the internet, pay-per-call and toll-free phenomenons germinated and grew. As a result millions of users, hosts and companies can communicate with one another both by computer and by phone. Busy signals have become less burdensome as consumers can now access accounts and purchase items on line or through a 1-800 number. In addition to the similarities in purpose both addresses reach their destination through the same wire transfers, cable or a satellite feeds and often through the same facilities. Lastly, the issues presented by telephone numbers and domain names are the same and include whether they can be separated from the services they use to function. This is why this Court can and should dispense with both important issues in this one case.

Network Solutions referenced two cases from 1960 and 1971 which it claimed supported its ruling. However, the cases involved interpretations of the Bankruptcy Act which have long fallen into disfavor by most federal courts. Considering that the Virginia Supreme Court nonetheless relied on them in a 2000 ruling indicates the need to provide undistinguishable contemporary guidance on the issue. The 1971 decision reached this Court on a petition for writ of certiorari. *In Re Best Re-Manufacturing Co.*, 453 F. 2d 848 (CA5 1971), *cert. denied, sub nom*, 406 U.S. 919 (1972). The issue presented was whether

14. *Kremen v. Cohen*, 99 F. Supp.2d 1168 (2000). The court in *Kremen* refused to follow *Network Solutions* finding merit in part in the strong dissent in *Network Solutions* which observed that domain names exist separate from the services it used. "These services . . . are mere conditions subsequent . . ." *Network Solutions, Inc.*, 529 S.E.2d at 89.

the telephone company could be summarily ordered to provide service to the receiver in a chapter 11 proceeding. The receiver argued that continuation of the debtor's old telephone number was of vital importance to the ongoing business concerns of the debtor and that to "submit to the telephone company's 'supersedure' requirements is to permit it to coerce preferential treatment of the debt owing to it by the debtor." *Id.* at 849. The court sided with the telephone company and relied solely on the other case cited in *Network Solutions*.[15]

Respondents also referred to opinion of the Federal Communications Commission that held that "subscribers do not own numbers." *In re Toll Free Serv. Access Codes*, 13 F.C.C.R. 9058, ¶20 (March 31, 1998). However, that decision also ran against prevailing constitutional law in adding that "maintaining the right to use a particular existing number when changing carriers is different than having an ownership interest in a number." Petitioners suggest that the right of usage is a property interest once conveyed and relied upon. This confusion is precisely why precedence is needed.

The Virginia Supreme Court did note that the Fifth and First Circuits run diametrically opposed to the Ninth and Second Circuits in ruling that a debtor has a property interest in a telephone number.[16] Citing the Supreme Court the Fifth Circuit in *Fountainbleau* overrode a public utility tariff and held:

> Bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have **actual or constructive possession**

15. *Id.* at 849, citing *Slernderella Systems of Berkeley, Inc. v. Pacific Telephone and Telegraph Co.*, 286 F.2d 488 (CA5 1960).

16. *In Re Security Inv. Properties, Inc.*, 559 F.2d 1321, 1324 (CA5 1977); *Darman v. Metropolitan Alarm Corp.*, 528 F.2d 908, 910 n.1 (CA 8 1976) (approving sale of telephone numbers in order to increase the value of a bankruptcy estate and noting distinction between "a subscriber's rights derived from a contract for telephone service and a subscriber's possible claim to a possessory interest in the telephone number").

> [**emphasis added**]. And the test of this jurisdiction is not title in but possession by the bankrupt at the time of the filing of this petition in bankruptcy.

In re Fontainebleau Hotel Corporation, 508 F.2d 1056, 1059 (CA5 1975), *citing Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 481 (1940).[17]

The Ninth and Second Circuits had required "undisputed title" to confer a property interest. However, the Fifth Circuit relied on a ruling of this Court that analyzed the collection of rights or interests in a thing in determining whether a property right vested. This Court foretold this conflict by crafting the "actual or constructive" standard. The Fourth Circuit as well as the Ninth and Second Circuits never considered that an interest other than and perhaps lesser than "undisputed title" might vest. The problem remains that many courts have not applied the "actual or constructive possession" standard in resolving disputes over telephone numbers. Alternatively, they simply did not believe it applied to some forms of intangible property such as commercial addresses. This is what must be clarified by this Court.

The rulings of the Ninth and Second Circuits are in "real and embarrassing conflict" with the Fifth and First Circuits. *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). The Fourth Circuit has now joined the fray challenging the Fifth and First Circuits. However, the confusion extends beyond federal courts to state courts in non-bankruptcy circumstances.[18] These cases also decisively

17. The Fifth Circuit also cited other cases supporting their application of the Bankruptcy Act. *In re Fontainbleau*, 508 F.2d at 1059, *citing See In re Rehkopf Mattress Sales, Inc.*, 479 F.2d 67, 70 (CA5 1973); *Schokbeton Industries, Inc. v. Schokbeton Products Corp.*, 466 F.2d 171, 177 (CA5 1972); *Willyerd v. Buildex Company*, 463 F.2d 996, 999 (CA 6 1972).

18. *Johnson v. Southern Bell Tel. and Tel. Company*, 169 So.2d 36, 37 (Fla. App. 1964), *citing See Clayton Home Equipment Co. v.* (Cont'd)

conflict with the Fourth Circuit in this case as well as the Ninth and Second Circuits.

In addition to the bankruptcy code other courts have upheld such property rights drawing from other federal statutes. In *Intermatic Inc.*, a district court considered whether a new breed of "cyber-squatters" infringed upon trademark rights by registering companies' "highly prized" tradenames as a domain name. 947 F. Supp. 1233 (N.D. Ill. 1996). These cyber-squatters then hold up the companies by offering to sell the domain names back to them at huge profits. The court denied the squatters the right to use the domain name noting;

> Dozens of companies, including Taco Bell, MTV, Kentucky Fried Chicken and others have had to cajole, pay thousands of dollars or even sue to gain the rights to domain names that match trademarks they have spent millions of dollars cultivating and protecting.

Id. at 1234, *citing Miller, Cyber Squatters Give Carl's Jr., Others Net Loss. Los Angeles Times*, 1996 WL 11004750.

This "necessity" of purchasing that which is yours flies in the face of trademark law, statutory safeguards not to mention goodfaith dealings. The district court in *Intermatic* held that cyber-squatters enjoin a business from using its trademark as its domain name on the Internet in violation of the Federal Trademark Dilution Act of 1995. *Id.* at 1234. From a practical standpoint, two individuals could not use the same name. Without property protections the law as it stands encourages the theft of commercial addresses and restrict private causes of action for conversion. *See, e.g., Shehi v. Southwestern Bell Telephone Company*, 382 F.2d 627 (CA 10 1967). The Fourth Circuit completely ignored this type of analysis.

(Cont'd)

Florida Tel. Corp., 152 So.2d 203, 204 (Fla. App. 1963); *State of Vermont v. LaPlante*, 449 A.2d 953, 954 (Vt. 1982);

Notwithstanding, even *Intermatic* has been unable to escape controversy and conflict.[19] As a result of this conflict Congress recently enacted the "Anticybersquatting Consumer Protection Act" as an amendment to Section 43 of the Trademark Act of 1946, 15 U.S.C. §§ 1125, *et seq.*[20]

Some district courts have applied trademark principles to telephone numbers in which companies have inserted tradenames or descriptive words.[21] In *American Exp. v. Accu-Weather, Inc.* a district court upheld American Express' ownership rights to use the 1-800 number "1-900-Weather" where it had invested in the number and obtained it from AT&T. The Fourth Circuit handed down a ruling in conflict with this case. American Exp. supports petitioners' position because it

19. At least two recent cases have declined to follow *Intermatic*: *Ford Motor Co. v. Great Domains. Com, Inc.*, 177 F. Supp.2d 635, 647 (E.D. Mich. Dec. 20, 2001); *HQM, Ltd. v. Hatfield*, 71 F. Supp.2d 500, 505 (D. Md. Dec. 02, 1999).

20. This Act included in the Trademark Act authorizes an "in rem civil action against the domain name in the judicial district in which the domain name registrar is located." Ironically, the court in *Network Solutions* referenced the "in rem" proceeding as supporting the existence of property interests in domain names but then neutralized its significance to the dispute presented without authority. The legislative history of the Act indicates that it was intended to address Internet domain name issues. Senator Patrick J. Leahy (D-Vt.) stated in discussing the Act: ". . . it is my hope that this anti-dilution statute can help stem the use of deceptive Internet addresses **taken [emphasis added]** by those who are choosing marks that are associated with the products and reputations of others." Remarks of Senator Leahy in the United States Senate, December 29, 1995, Cong. Rec.S.19312 (104th Cong. 1995).

21. *See e.g. American Exp. v. Accu-Weather, Inc.*, 849 F. Supp. 233 (S.D.N.Y. 1994); *Cytanovich Reading Center v. Reading Game*, 162 Ca. App. 3d 107, 112, 208 Cal. Rptr. 412, 416 (Cal. App.1 Dist. 1984); *Play Time, Inc. v. LDDS Metromedia Communications, Inc.*, 125 F.3d 23 (CA 8 1997) (holding that a jury may properly find that a 1-800 number had inherent value in the marketplace).

did not involve trademark principles but rather basic property rights — "weather" is not sufficiently distinct.

Court's have ruled that by using a registered tradename as part of a domain name one was using another's intangible property interest.[22] This begs the question that if we protect a distinct trademark used in commercial settings then why do we not extend the same value to 1-800 telephone numbers and internet addresses that do not contain a trademark but which are distinct, valuable and used in a business context.

Since the rulings of the Ninth and Second Circuits the tide had overwhelmingly turned toward acknowledging a debtor's property interest in its telephone number pursuant to the Bankruptcy Code.[23] This Court has not ruled on this important issue. The Supreme Court of Virginia as sanctioned by the Fourth Circuit is attempting to turn this tide in yet another direction by harkening back to two obscure cases from 1960 and 1971. In doing so the Virginia Supreme Court relied on a Ninth Circuit case where certiorari was denied by this Court. Considering the economic interests involved in this ever-changing industry interests of the public, the subscribers and the telephone companies must be balanced.

22. Other court's have by implication allowed trademark registrants to proceed under the Lanham Trade-Mark Act, 43(a) 15 U.S.C.A. § 1125(a) where their name is used as part of a domain name. *See, e.g., HQM, LTD v. Hatfield* 71 F. Supp.2d 550, 504 (D. D. Md. 1999).

23. *Id.* at 1059; *In re Utica Floor Maintenance, Inc.*, 25 B.R. 1010, 1014, 8 Collier Bankr. Cas.2d 157, 10 Bankr. Ct. Dec. 167, 167 Bankr. L. Rep. P 69, 049, 69049 (N.D.N.Y. Dec. 21, 1982) (granting debtor's motion to show cause restraining telephone Company from terminating telephone services even though debtor had fallen behind on payments); *In re R.E.B. & B., Inc.*, 200 B.R. 262, 264, 29 Bankr. Ct. Dec. 842, 843 (1996) (holding that "generally telephone numbers are property of the estate); *In re Kassuba*, 396 F. Supp. 324 (1975); *In Re Personal Computer Network, Inc.*, 97 B.R. 909 (1989) (holding that right of use is surely the most important attribute of possession); *In Re Connecticut Pizza, Inc.*, 193 B.R. 217 (Bkrtcy. D. Md. 1996) (holding that the right to use the telephone number was at a minimum a possessory interest protected by the automatic stay).

This is especially troublesome because the issues revolve around an interstate matter over which Congress has asserted control in enacting The Anticybersquatting Act, the Bankruptcy Code and the Trademark Act. This is why property rights must be consistently as well as uniformly applied in all circumstances including cases arising under the Act. Considering the wealth of federal statutes that apply to the issue federal and state courts may not be listening to or following the legislative branch. If not companies may have to flea to bankruptcy court to protect their valuable commercial addresses.

III. THE FOURTH CIRCUIT IGNORED TARIFFS, THE ACT AND COMMON LAW WHICH IMPOSE A DUTY ON TELEPHONE CARRIERS TO PROTECT THE RIGHTS OF A NON-SUBSCRIBER

Petitioners averred that the respondents owed them a duty of care to follow regulations governing the assignment and use of their 1-800 number as well as owing them a duty to protect the number itself. The duty alleged was conferred by the Act, 47 U.S.C. § 201(b) as well as under state tort law. (Pet. App. 12a, 19a-20a). By misprinting the number As well as using it respondents breached their duty of due care.

The district court made two independent rulings regarding these intertwined negligence and injury to property claims.[24] First, since it ruled that a telephone number was not property the court characterized the case as one for economic loss for which privity of contract was required. (Pet App. 12a). The court clearly erred in classifying the case as one for economic loss because the loss sounded in tort not contract as their was no

24. The court noted that a negligence claim can also be supported by injury to property. Pet. App. 12a), *citing see, e.g., Copenhaver v. Rogers*, 238 Va. 361, 366 (1988). The elements needed to establish both are identical. For this reason Petitioners will deal with both tort claims as if they were one because both rely on a breach of a duty.

loss of bargained for expectancies.[25] This is another reason why the proper cause is negligence. If this Court does not establish standards for determining whether commercial addresses are numbers and reverse the Fourth Circuit petitioners will be without a cause of action because it had no contract with respondents. In the "best of all possible worlds" no loss should go without redress. *See Parratt v. Taylor*, 451 U.S. 529, 533 (1981).

Alternatively, the district court ruled that there was no duty conferred by the Act since "defendants provided no telecommunications services to plaintiffs." (Pet. App. 6a.). It did this while attempting to frame the case as a simple one involving the "misprinting" of a telephone number in a computer instruction manual by Compaq. (Pet App. 6a, 12a). The Court was correct in one sense and for this action a negligence cause should have lied.[26] However, respondents also used the number for a considerable period of time, albeit, again by an act of negligence. By disturbing the usage of the number, they deprived petitioners of their property interests in usage. The district court added that this misprinting "in no way" implicates the provision of common carrier services since there was only one actual telephone company listed as a defendant. However, petitioners

25. On appeal petitioners argued that in determining whether privity of contract is required one must determine if the conduct sounds in negligence or in breach of contract. Where tort law is designed to advance the broad interests of social policy by protecting the safety of person and property from injury, contract law is designed to protect bargained-for expectations. *Sensenbrenner v. Rust, Orling & Neale*, 374 S.E.2d 55, 58 (1983). Since the "type of loss at issue" is property damage contemplated by tort law as opposed to damaged expectations arising from an agreement, privity is not required. *Id.*

26. If this was the only issue then an exculpatory clause may have limited respondents' liability. However, there was no contract between the parties for printing the number in, for example, the yellow pages which is a common dispute. *Atkin Wright & Miles v. The Mountain States Telephone and Telegraph Co.*, 709 P.2d 330 (Utah 1985); *cf, Pigman, supra*, 641 N.E.2d 1026.

clearly argued that Compaq was liable as an agent of the SBC Companies pursuant to 47 U.S.C. § 217. Additionally, the internet companies are, arguably common carriers by transmitting signals by wire transfer.[27]

The main problem with the Fourth, Ninth and Second Circuit opinions is that they pigeon hole such disputes as one arising in contract eliminating all tort implications. This ignores the status of common carriers as "quasi-public character" having a "duty" to serve the public as opposed to merely involving a private contract.[28] Their obligations are not measured by the same rules applicable to common carriers of goods. *Poteet v. Western Union Tel. Co. PA.*, 74 U.S. 491 (1906). As such the duty arises independently of any contractual relationship between the parties. *GTE North Inc. v. Carr*, 618 N.E.2d 249 (1993).

This Court has held that common carriers are liable for negligence in the performance of their public duties, *Primrose v. Western Union Tel. Co., Pa.*, 154 U.S. 1 (1894). They have a duty to transact business with accuracy, promptness and impartiality and to exercise due care in the discharge of its public duties. *Clemens v. Western Union Telegraph Co.*, 28 A.2d 889. Respondents can also be liable for interfering and interrupting service of a customer under a negligence cause. *Vinson v. Southern Bell Tel. & Telegraphs Co.*, 66 So. 100 (1914). The Fourth Circuit's reclassification of the case as one for economic loss requiring privity runs contrary to the *Vinson*. The scenario that the caselaw ignores and which the Fourth Circuit excluded is

27. An issue presented is whether internet companies provide interstate telecommunication services by sending signals over wires via the internet. A "common carrier" is defined by 47 U.S.C. § 153(10) is "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, . . ."

28. *Clemens v. Western Union Telegraph Co.*, 28 A.2d 889 (1942); *Modern Equipment Co. v. Puerto Rico Tel. Co.*, 440 F. Supp. 1242 (D.C. P.R. 1977).

the instance involving injury to a non-subscriber. This is what this Court must pass on.

The ruling is particularly troubling because the duty imposed is entrenched in three bodies of law. One of the source of the duty is in the official tariff or state regulation as filed. *See, e.g., Carmichael v. Southern Bell Telephone & Telegraph Co.*, 78 S.E. 507, 162 N.C. 333 (1913). However those regulations usually apply the relationship between the carrier and its subscribers. It does not govern cases outside a contract for services which nonetheless involve the assignment of numbers and the use of telephone service.

It would appear that the language in the Act, also generates the duty in requiring that "all charges, practices, classifications, and regulations . . . shall be just and reasonable." 47 U.S.C. § 201(b). The language does not preclude nonsubscribers but relates generally to all "practices". Courts have held that a negligence cause arises under the Communication Act where there is an alleged violation of the Act. *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, 488 (CA2 1968). That case also involved services provided to a subscriber. Lastly, carriers are under a common law obligation to transact their duty with accuracy, promptness and impartiality. *Board of Public Utilities v. Fenton*, 669 S.W.2d 612, 616 (Mo. App. 1984). The Fourth Circuit opinion flies in the fact of this law, however, there was little to no legal authority on the issue.

Since this Court has ruled that carriers owe a duty to the public the sole issue presented is whether that duty established by common law, tariffs or the Act applies only to interfering with the use of a number of a subscriber. Logic would dictate that it does not. What the ruling essentially means is that a telephone company can take a number from a private citizen for its own use and be held to no standard simply because either (a) the individual is not its customer or (b) a telephone number is not property. Putting aside the paradoxical twist that respondents' do not own the number because it was Verizon

who assigned it the failure to assign a duty by the court fits hand in hand with the determination that a telephone number does not embody property rights or interests. Based on the law if the telephone number was property then the carriers would clearly be liable for causing damage to it.[29]

CONCLUSION

In summary there are abundant reasons for granting petitioners' writ primarily because the issues presented interfaces and overlaps with constitutional principles, state regulations or law, federal statutes and issues that are at the forefront of our technological age. The reasons include the following: 1) The Fourth Circuit's decision conflicts with rulings of other states on an important federal issue; 2) The Fourth Circuit's decision conflicts with the Ninth and Second Circuits on the same important matter; 3) The Fourth Circuit's decision has decided an important question of federal law addressed in several federal statutes; and 4) The Fourth Circuit has decided an important federal question that conflicts with a decision of this Court. *See* Sup. Ct. R. 10.

Respectfully submitted,

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Attorney for Petitioners

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29. *See, e.g., Moersdorf v. New York Telephone Co.*, 87 A. 473 (1913); *Wyant v. Central Tel. Co.*, 81 N.W. 928 (1900). Petitioners have an even stronger case than traditional negligence cases involving common carriers because they gave notice to respondents of the harm occurring and yet the injury continued. *See Thompson v. Reed*, 135 N.W. 679 (1912).

APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED OCTOBER 16, 2001

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 01-1405

RICKY HAGENBUCH; CATHY HAGENBUCH; RICKY HAGENBUCH BUILDING CONTRACTOR, INCORPORATED; HEALTHFUL LIVING,

Plaintiffs - Appellants,

versus

COMPAQ COMPUTER CORPORATION; SBC COMMUNICATIONS, INCORPORATED, d/b/a Southwestern Bell Telephone Company; PACIFIC BELL TELEPHONE COMPANY; SOUTHWESTERN BELL INTERNET SERVICES, INCORPORATED, d/b/a SBC Internet Services, Incorporated; PACIFIC BELL INTERNET SERVICES; SBC ADVANCED SOLUTIONS, INCORPORATED, a/k/a ASI,

Defendants - Appellees,

and

AMERITECH, INCORPORATED; DSL TECHNOLOGIES, INCORPORATED; ASI COMPUTER TECHNOLOGIES, INCORPORATED,

Defendants.

Appendix A

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. T.S. Ellis, III, District Judge. (CA-00-2073-A).

Submitted: Sept. 28, 2001 Decided October 16, 2001

Before WIDENER, LUTTIG, and KING, Circuit Judges.

* * *

PER CURIAM.

Appellants appeal from the district court's order dismissing their civil complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Our review of the record included on appeal and the parties' briefs discloses no reversible error. Accordingly, we affirm on the reasoning of the district court. *Hagenbuch v. Compaq Computer Corp.*, No. CA-00-2073-A (E.D. Va. filed Feb. 7, 2001; entered Feb. 8, 2001). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION DISMISSING AMENDED COMPLAINT DATED FEBRUARY 7, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 00-2073-A

RICKY HAGENBUCH, et al.,

Plaintiffs

v.

COMPAQ COMPUTER CORP., et al.,

Defendants.

ORDER

On December 12, 2000, four plaintiffs[1] filed an eight-count complaint, alleging the following causes of action: (i) Count I – violation of (a) Title II of the Telephone Disclosure and Dispute Resolution Act, 15 U.S.C. § 5711 *et seq.* and the (b) Telephone Consumer Protection Act; (ii) Count II – Injury to Property; (iii) Count III – Conversion;

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1. The plaintiffs in this case are: Ricky Hagenbuch and Kathy Hagenbuch, both Virginia residents, Ricky Hagenbuch Building Contractor, Inc., a Virginia corporation, and Healthful Living, a company operating in Virginia.

(iv) Count III – Negligence; (v) Count IV – Infliction of Emotional Distress; (vi) Count VI – Negligent Supervision; (vii) Count VII – Invasion of Right to Privacy; and (viii) Count VIII – False Light. In addition to the complaint, plaintiffs also filed a motion for a preliminary injunction. In the course of the hearing on the preliminary injunction, the Court, *sua sponte*, questioned both subject matter jurisdiction and whether the federal and state claims asserted in the complaint stated valid claims pursuant to Rule 12(b)(6), Fed. R. Civ. P. Specifically, plaintiffs' counsel was asked to identify the specific federal statutory provision that established federal question jurisdiction. In response, plaintiffs' counsel admitted that he could cite no specific provision of the Telegraphs, Telephones and Radiotelegraphs Act, 47 U.S.C. § 1 *et seq.* or the Telephone Disclosure and Dispute Resolution Act, 15 U.S.C. § 5701 *et seq.* that provided his clients with a private cause of action against defendants based on the facts alleged in the complaint. Instead, plaintiffs' counsel stated that plaintiffs relied on the statute as a whole. Such general reliance is insufficient.[2] Accordingly, in addition to denying the motion for a preliminary injunction, plaintiffs were directed to submit a memorandum setting forth with particularity the basis for subject matter jurisdiction – either federal question or diversity jurisdiction. *See Hagenbuch v. Compaq Computer Corp.*, Order, Civil Action No. 00-2073-A (E.D. Va. Jan. 19, 2001). In response, plaintiffs did not file a memorandum as directed by the Court; instead, on January 29, 2001, plaintiffs filed an Amended Complaint. As defendants had not then

2. Moreover, neither 15 U.S.C. § 5701 *et seq.* nor 47 U.S.C. § 227 provide any basis whatever for federal question jurisdiction based on the allegations at bar.

filed responsive pleadings, plaintiffs were entitled to file an amended complaint. *See* Rule 15(a), Fed. R. Civ. P. In the Amended Complaint, plaintiffs abandon their claims made in the original Complaint under the Telephone Disclosure and Dispute Resolution Act, 15 U.S.C. § 5701 *et seq.* and the Telephone Consumer Protection Act, 47 U.S.C. § 227, and instead rely exclusively in the Amended Complaint on 47 U.S.C. § 202. Defendant, Compaq Computer Corporation, and defendants, SBC Communications, Inc., Pacific, Bell Telephone Company, Southwestern Bell Internet Services, Inc., Pacific Bell Internet Services, and SBC Advanced Solutions, Inc. ("SBC defendants") moved to dismiss the Amended Complaint on various grounds, including lack of personal and subject matter jurisdiction and failure to state a claim. *See* Rule 12, Fed. R. Civ. P. On February 5, 2001, plaintiffs filed a reply to defendants' motions to dismiss. In this reply, plaintiffs contend that their federal cause of action rests also on 47 U.S.C. § 201(b) and not solely on Section 202.[3] For the following reasons, the Amended Complaint fails to allege a valid basis for personal jurisdiction or valid causes of action under state or federal law, and thus, plaintiffs' Amended Complaint must be dismissed.

The Amended Complaint provides no basis for personal jurisdiction over the SBC defendants. These defendants are neither Virginia corporations, nor have their principal place of business here. Furthermore, it appears that none of these defendants have any continuous or systematic

3. While the Amended Complaint does not include a specific citation to 47 U.S.C. § 201(b), the applicability of this section to the facts alleged is also addressed here.

contacts with Virginia that might support general personal jurisdiction. Moreover, there are no facts alleged to support any basis for jurisdiction under the Virginia Long Arm statute. *See* Va. Code § 8.01-328.1. Given this, there is substantial doubt that personal jurisdiction exists over these defendants.[4] Because the record is sparse on the personal jurisdiction issue, analysis will proceed on whether plaintiffs have stated valid causes of action under federal and state law.

Plaintiffs now assert that the Telegraphs, Telephones and Radiotelegraphs Act, 47 U.S.C. §§ 201(b), 202 provides the basis for federal question jurisdiction. Specifically, plaintiffs contend that defendants' failure to establish dispute resolution procedures to protect plaintiffs against unwarranted calls and charges to their 1-800 number violated this section of the Act.

Plaintiffs' reliance on Section 201(b) to establish federal jurisdiction fails because defendants provided no telecommunications services to plaintiffs. 47 U.S.C. § 201(b) provides that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable. . . ." This statute is directed at telecommunications common carriers. While this statute might apply to defendant, Pacific Bell Telephone Company in California, where it operates local telephone service, the statute is wholly inapplicable to the defendants, none of whom provide any telephone service to customers

4. Furthermore, there is doubt over whether there was proper service of process on defendant, SBC Communications Inc. *See* Rule 12(b)(4), Fed. R. Civ. P.

in Virginia. Plaintiffs allege that their injury resulted from the misprinting of a telephone number in a computer instruction manual by Compaq. This action in no way implicates the provision of common carrier services. Accordingly, plaintiffs have no claim under Section 201(b) or, in fact, the Telecommunications Act as a whole.

Furthermore, plaintiffs' reliance on Section 202 also fails as this provision is designed to prevent discrimination in rates and/or services. For example, this statute bars common carriers from charging its customers different fees for the same service. *See Advamtel, LLC v. AT&T Corp.*, 118 F. Supp. 2d 680 (E.D. Va. 2000) (47 U.S.C. §§ 201, 202 prevent local exchange carriers from imposing on long distance carriers different rates for access services than the terms specified in their filed tariff); *Access Communications, Inc. v. Southwestern Bell Communications, Inc.*, 137 F.3d 605, 607 (8th Cir. 1998) (Section 202 claim that common carrier was overcharging customer for its service in violation of the filed rate doctrine); *National Communications Assn v. AT&T Corp.*, 46 F.3d 220 (2d Cir. 1995) (invoking Section 202 against a long distance carrier who required a customer to pay a deposit to receive services because of previous late payments). This case does not involve discrimination in the provision of services. Put simply, plaintiffs have not alleged that defendants have charged them any fees or denied them any service mandated by their filed tariffs or provided to other customers. Accordingly, plaintiffs' claim for relief under 47 U.S.C. § 202 must fail. Therefore, there is no basis for federal question jurisdiction.

Plaintiffs' Amended Complaint also contends that subject matter jurisdiction exists because there is diversity of

citizenship among the adverse parties and there is more than $75,000 in controversy. *See* 28 U.S.C. § 1332. Although the adverse parties appear to be diverse, thus satisfying the first requirement of diversity jurisdiction, it is unlikely that any of the plaintiffs has suffered in excess of $75,000 in damages. The Supreme Court has stated that "the sum claimed by the plaintiff controls [to establish the amount in controversy requirement,] if the claim is apparently made in good faith." *Saint Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938). Dismissal is warranted only if "[i]t . . . appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount. . . ." *Id.* These principles, applied here, point persuasively to the conclusion that the amount in controversy requirement has not been met. As a threshold matter, it is settled that claims by multiple plaintiffs may not be aggregated unless the claims are "common and undivided." *Zahn v. Int'I Paper Co.*, 414 U.S. 291, 294 (1973). Given that plaintiffs' claims are separate and distinct and thus cannot be aggregated, it appears to a legal certainty that plaintiffs have not met the amount in controversy requirement. First, in the course of the hearing on the motion for preliminary injunction, plaintiffs conceded that neither of the two business plaintiffs use the 1-800 number as their principal business line. Second, because plaintiffs have not alleged any physical injury, it is not possible to recover a claim for emotional distress. *See Womack v. Eldridge*, 215 Va. 33, 342 (1974). Because little or no business loss can be attributed to defendants alleged acts and because plaintiffs cannot recover for emotional distress, it appears to "a legal certainty" that each plaintiffs' claim for damages does not exceed $75,000. Accordingly, plaintiffs have not satisfied the amount in controversy requirement. Even assuming,

arguendo, that plaintiffs have met the requirements for diversity jurisdiction, the Amended Complaint must still be dismissed because plaintiffs' seven state claims fail under Virginia law.[5]

Counts II and II allege injury to, and conversion of, plaintiffs' property. Both of these claims fail, because the Supreme Court of Virginia has held that an individual does not have a property interest in his or her telephone number. *See Network Solutions, Inc. v. Umbro Int'l, Inc.*, 259 Va. 759, 772 (2000) (noting that while other jurisdictions have found a property interest in telephone numbers, Virginia does not). Because these numbers are not personal property, no conversion claim can be based on plaintiffs' 1-800 number. *See Economopoulos v. Kolaitis*, 259 Va. 806, 813 ("An action for conversion can be maintained only by the person having a property interest in . . . the item alleged to have been wrongfully converted.). Furthermore, even if the telephone number were property, it is certainly intangible property, and as such, plaintiffs' claim still fails as Virginia law allows conversion of only certain intangible property in circumstances not present here. *See United Leasing Corp. v. Thrift Ins. Corp.*, 247 Va. 299, 305 (2000) (noting limited exception for intangible property rights that "arise from or are merged with a document, such as a valid stock certificate"). Accordingly, plaintiffs' claims under Counts II and III must fail.

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5. Plaintiffs' state claims are as follows: (i) Count II – Injury to Property; (ii) Count III – Conversion; (iii) Count IV – Negligence; (iv) Count V – Infliction of Emotional Distress; (v) Count VI – Negligent Supervision; (vi) Count VII – Invasion of Rights to Privacy; and (vii) Count VIII – False Light.

Appendix B

Count VII and VIII of plaintiffs' Amended Complaint must also be dismissed. While the Supreme Court of Virginia has not addressed this point directly, four federal courts have rejected both right to privacy and false light claims, on the ground that Virginia law does not permit such causes of actions.[6] Accordingly, plaintiffs' claims under Counts VII and VIII must be dismissed as well.

In Count VI, plaintiffs assert a claim for negligent supervision contending that defendants breached "a duty of care to plaintiffs . . . to adequately supervise [its] employees." Virginia law, however, does not recognize the tort of negligent supervision of employees. *See Chesapeake § Potomac Tel. Co. v. Dowdy*, 235 Va. 55, 61 (1988) ("In Virginia, there is no duty of reasonable care imposed upon an employer in the supervision of its employees under these circumstances and we will not create one here."). Accordingly, this Count must be dismissed, as well.

Plaintiffs' claim for damages under Count V is for intentional and negligent infliction of emotional distress. It is well-settled that such claims are "not favored" in

6. *See Brown v. American Broad. Co.*, 704 F.2d 1296, 1302-03 (4th Cir. 1983); *Falwell v. Penthouse Int'l, Ltd.*, 521 F. Supp. 1204 (W.D. Va.1981); *Evans v. Sturgill*, 430 F. Supp. 1209 (W.D. Va.1977); *Bernstein v. National Broad. Co.*, 129 F. Supp. 817, 825 (D.D.C. 1955), *aff'd*, 232 F.2d 369 (D.C. Cir.1956); *see also Smith v. Dameron*, 1987 WL 488719, at *3 (Va. Cir. Ct. 1987) ("The Virginia Supreme Court has recognized no common law cause of action for invasion of privacy."). Virginia law does recognize a limited privacy right in circumstances not present here; this right provides an individual with protection from the use of a person's name, portrait or picture, without his consent, for commercial purposes. *See* Va. Code § 8.01-40.

Virginia. *Michael v. Sentara Health Servs.*, 939 F. Supp. 1220, 1233 (E.D. Va. 1996). More fundamentally, the standard for maintaining such a cause of action is a stringent one, requiring conduct that "has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency . . . in a civilized community." *Russo v. White*, 241 Va. 23, 37 (1991). Furthermore, to succeed on a claim of negligent infliction of emotional distress, plaintiffs must allege, and prove by clear and convincing evidence, that the emotional distress produced a physical injury. *See Adams v. Star Enter.*, 51 F.3d 417, 423 (4th Cir. 1995); *Womack*, 215 Va. at 342.

These principles, applied here, compel the conclusion that plaintiffs' claims are insufficient to avoid dismissal of these counts. In *Russo*, the Supreme Court of Virginia rejected a plaintiff's claims for emotional distress despite the allegations that plaintiff received 340 calls in a two month period from a deranged man and suffered "severe emotional distress" and "physical symptoms," including loss of sleep, lack of concentration, and withdrawal from activities. *See, Russo*, 241 Va. at 26; *see also Michael*, 939 F. Supp. at 1223 (dismissing intentional infliction of emotional distress claim where plaintiff alleged that she was unable to work, had diminished appetite, lost income, and was confined to her home). Similarly, in the instant matter, plaintiffs' claims of "stress and anxiety related illness including fever, headaches, nausea, high blood pressure, loss of sleep, accelerated heart rate, and other psychological ailments," (Compl. ¶ 116), are not "so severe that no reasonable person could be expected to endure it." *Russo*, 241 Va. at 27. Accordingly, plaintiffs' claims under Count V must be dismissed.

Appendix B

Count IV of plaintiffs' Amended Complaint also fails. To establish a cause of action for negligence, plaintiffs must prove that defendants breached a legal duty owed the plaintiffs and that this breach proximately caused plaintiffs' injuries. *See Bartlett v. Roberts Recapping, Inc.*, 153 S.E.2d 193, 196 (Va. 1997). The legal duty cited by plaintiffs are the requirements of the federal statute and a duty to protect plaintiffs' privacy rights. Because, as noted, neither the federal statute nor the privacy rights are applicable to this case, plaintiffs have not stated any legal duty owed to plaintiffs that defendants have breached.

Furthermore, even if defendants breached a duty to plaintiffs, plaintiffs have alleged no physical injuries.[7] It is well-settled that in Virginia there is no recovery for mental anguish that is not accompanied by contemporaneous physical injuries. *Ruth v. Fletcher*, 237 Va.

7. A negligence claim can also be supported by injury to property. *See, e.g., Copenhaver v. Rogers*, 238 Va. 361, 366 (1988). Plaintiffs have claimed injury to their telephone number. As noted, Virginia does not recognize a property right in telephone numbers. Accordingly, plaintiffs claim for relief is for purely economic loss, unconnected to injury to person or property. In such a case, plaintiffs are entitled to recovery only if there is privity of contract between the parties. *See id.* at 366 ("[T]his is a case involving a claim solely for economic losses. It is settled in the Commonwealth that no cause of action exists in such cases absent privity of contract."); *see also Beard Plumbing & Heating, Inc. v. Thompson Plastics. Inc.*, 152 F.3d 313, 316 (4th Cir. 1998) ("Virginia law is clear that, absent privity of contract, economic losses cannot be recovered in a negligence action."). Because plaintiffs lease their 1-800 number from Verizon, who is not a party to this action, privity is absent, and thus, plaintiffs are not entitled to recover for their alleged economic loss.

266, 272 (1989) (citing *Bowler v. May*, 166 S.E. 550, 557 (Va. 1932)). The symptoms alleged by plaintiffs are "typical symptoms of an emotional disturbance" and are insufficient to state a claim for negligence. *See Myseros v. Sissler*, 239 Va. 8, 12 (1990).

For these reasons and based on the record as a whole,

It is **ORDERED** that plaintiffs' Amended Complaint is **DISMISSED**.[8]

The Clerk is directed to place this matter among the ended causes and send a copy of this Order to all counsel of record.

s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
February 7, 2001

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8. By separate Order, counsel for plaintiffs will be required to show cause why various claims in the Complaint and the Amended Complaint are not in violation of Rule 11(b)(2), Fed. R. Civ. P., as not "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION DENYING MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT DATED FEBRUARY 7, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 00-2073-A

RICKY HAGENBUCH, et al.,

Plaintiffs

v.

COMPAQ COMPUTER CORP., et al.,

Defendants.

ORDER

The matter is before the Court on plaintiffs' motion for leave to file a second amended complaint.

On January 29, 2001, plaintiffs filed an Amended Complaint. As defendants had not then filed responsive pleadings, plaintiffs were entitled to file an amended complaint. *See* Rule 15(a), Fed. R. Civ. P. On February 7, 2001, two Orders were entered: one dismissed plaintiffs' Amended Complaint, while the second required counsel for plaintiffs to show cause why the Complaint and Amended

Complaint were not in violation of Rule 11, Fed. R. Civ. P. *See Hagenbuch v. Compaq Computer Corp.*, Order, Civ. A. No. 00-2073 (E.D. Va. Feb. 7, 2001) (dismissing Amended Complaint); *Hagenbuch v. Compaq Computer Corp.*, Order, Civ. A. No. 00-2073 (E.D. Va. Feb. 7, 2001) (Order to Show Cause). Also, on February 7, 2001, plaintiffs filed the instant motion for leave to file a second amended complaint.

Rule 15(a), Fed. R. Civ. P. provides that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served. . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." The Fourth Circuit has directed that "leave to amend shall be given freely, absent bad faith, undue prejudice to the opposing party, or futility of amendment." *United States v. Pittman*, 209 F.3d 314, 317 (4th Cir. 2000); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962); *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir. 1980). Because plaintiffs' Second Amended Complaint raises three state law claims that are identical to Counts II, III, and IV of the Amended Complaint, which were dismissed by Order of even date, leave to amend must be denied as amendment of the complaint is futile. *See Hagenbuch v. Compaq Computer Corp.*, Order, Civ. A. No. 00-2073 (E.D. Va. Feb. 7, 2001) (dismissing plaintiffs' Amended Complaint).

For these reasons,

It is **ORDERED** that plaintiffs' motion for leave to file a second amended complaint is **DENIED**.

The Clerk is directed to send a copy of this Order to all counsel of record.

s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
February 7, 2001

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED NOVEMBER 30, 2001

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1405
CA-00-2073-A

RICKY HAGENBUCH; CATHY HAGENBUCH; RICKY HAGENBUCH BUILDING CONTRACTOR, INCORPORATED; HEALTHFUL LIVING

Plaintiffs - Appellants

v.

COMPAQ COMPUTER CORPORATION; SBC COMMUNICATIONS, INCORPORATED, d/b/a Southwestern Bell Telephone Company; PACIFIC BELL TELEPHONE COMPANY; SOUTHWESTERN BELL INTERNET SERVICES, INCORPORATED, d/b/a SBC Internet Services, Incorporated; PACIFIC BELL INTERNET SERVICES; SBC ADVANCED SOLUTIONS, INCORPORATED, a/k/a ASI

Defendants - Appellees

Appendix D

and

AMERITECH, INCORPORATED; DSL TECHNOLOGIES, INCORPORATED; ASI COMPUTER TECHNOLOGIES, INCORPORATED

Defendants

ORDER

Appellants have filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX E — STATUTE INVOLVED

47 U.S.C. § 201

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: Provided, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: Provided further, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier

subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: Provided further, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.